United Nations CED/C/MNE/CO/1/Add.1

International Convention for the Protection of All Persons from Enforced Disappearance

Distr.: General
16 January 2017

Original: English
English, French and Spanish only

Committee on Enforced Disappearances

Concluding observations on the report submitted by Montenegro under article 29 (1) of the Convention

Addendum

Information received from Montenegro on follow-up to the concluding observations*

[Date received: 8 December 2016]

UNITED NATIONS
DEPOSITORY
FEB 15 2017
UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

* The present document is being issued without formal editing.

GE.17-00633(E)
1700633

Please recycle

I. Information relating to paragraph 9 of the concluding observations

Paragraph 9

The Committee recommends that the State party adopt the measures necessary to make enforced disappearance an autonomous offence in line with the definition contained in article 2 of the Convention. It further recommends that the offence be punishable by appropriate penalties which take into account its extreme seriousness, and that a system of superior responsibility that is in accordance with article 6 (1) (b) of the Convention be applicable to this offence.

1. Although the Criminal Code of Montenegro fails to include enforced disappearance as an autonomous offense, it is incorporated in the following crimes: unlawful deprivation of liberty under Article 162, Abduction by Force under Article 164, Crimes against Humanity under Article 427, and War Crimes against Civilians under Article 428 of the Criminal Code.

2. Protected element in a criminal offense under Article 162 is the freedom of human being i.e. the right to the freedom of movement, while the offense is defined as the arrest, keeping in detention, or unlawful deprivation or limitation of the freedom of movement in any other way.

3. The act of commission of the basic form of a criminal offense under Article 164 consists in the removal or retention of a person by force, threat, deceit or by other means. This crime contains the elements of the crime of unlawful deprivation of liberty, coercion and extortion.

4. One of the acts constituting the criminal offense prescribed under Article 427 is "the detention or abduction of persons without disclosing information on it so as to deprive them of legal assistance", while one of the acts constituting the criminal offense under Article 428 is "the unlawful deprivation of liberty and imprisonment."

5. Taking into account the above stated, we are of the opinion that from the criminal justice point of view, the enforced disappearance, as a negative phenomenon, is regulated and sanctioned in Montenegro, and that there is no need to separately prescribe the acts of commission as an autonomous offense. This assessment is also based on the fact that current legislation does not pose any obstacle to the implementation in practice, and the fact that the prescribing of an autonomous offense would not make any substantial changes.

II. Information relating to paragraph 25 of the concluding observations

Paragraph 25

The Committee recommends that the State party take the measures necessary to ensure that, in practice, all persons deprived of their liberty can communicate without delay with their families or any person of their choosing and have access to an independent lawyer from the very outset of the deprivation of liberty. It also recommends incorporating the right to challenge the legality of a detention into the list of rights that cannot be limited during a state of war or emergency. The State party should also ensure that the information on all persons deprived of their liberty

is effectively entered in registers and/or records in accordance with standard protocols and that the information contained therein includes, as a minimum, that required under article 17 (3) of the Convention.

6. Montenegro protects the rights and freedoms of persons, while everyone is obliged to respect the rights and freedoms of others. The prohibition of secret detention is a principle protected by the Constitution of Montenegro, as the highest legal act of Montenegro, which stipulates that everyone has the right to personal liberty and that the deprivation of liberty is permitted only for the reasons and in the procedure stipulated by law. A person deprived of liberty must be informed promptly, in a language which understands, about the reasons for apprehension, and shall be made aware that is not obliged to give any statement. At the request of the person deprived of liberty, the authority is obliged to immediately inform the person of choosing of the person deprived of liberty about the deprivation of liberty. A person deprived of liberty shall have the right to defense counsel of its choosing to be present at its interrogation. Also, Montenegrin Constitution expressly prohibits unlawful deprivation of liberty (Article 29). The Constitution stipulates that a person may be detained and kept in custody only on the basis of a decision of the competent court, if there is reasonable doubt that the person has committed a criminal offense, and only if it is necessary to conduct criminal proceedings (Article 30). The Constitution stipulates that a person unlawfully or wrongfully deprived of liberty or wrongfully convicted shall be entitled to compensation of damage from the State (Article 38). The Constitution of Montenegro, under Article 25 states that the right to a remedy and legal aid, compensation for unlawful or illegal deprivation of liberty and ungrounded conviction cannot be limited during the proclaimed state of war or emergency.

7. The principles of the prohibition of secret detention have been confirmed by the Criminal Procedure Code, which stipulates that detention may be ordered only in cases prescribed by this Code, and only if the same purpose cannot be achieved by another measures, and the detention is necessary to ensure the unhindered conduct of the proceedings. It is the duty of all bodies participating in criminal proceedings and of agencies extending legal aid to proceed with particular urgency if the accused is in custody. Throughout the proceedings, detention shall be terminated as soon as the grounds on which it was ordered cease to exist (Article 174). Pursuant to Article 176, detention at the proposal of the authorized prosecutor is ordered by a decision of the competent court, after the preliminary hearing of the accused. The Code explicitly states the grounds for detention (Article 175), regulates the determination of the duration of detention, cancellation of detention, the determination and control of detention after the indictment, the obligation of the notification of detention immediately and not later than 24 hours from the moment of deprivation of liberty, except if the detainee explicitly opposes. The Code stipulates the obligation to respect the personality and dignity of a detainee, as well as its accommodation, rights, correspondence and reception of visits and other procedures related to the detention of persons.

8. The Law on the enforcement of sentences of imprisonment, fines and security measures ("Official Gazette of Montenegro", No. 036/15) stipulates the prohibition of secret detention, providing that a convicted person shall enjoy the protection of the fundamental rights guaranteed by the Constitution, the law and international treaties. An offender, in the course of the enforcement of criminal sanctions, may be deprived of certain rights i.e. its rights may be restricted only to the extent appropriate to the nature and content of such sanctions and in the manner that ensures respect for the personality of the offender and its human dignity (Article 11). This law in Article 4 sets out that acts by which the convicted person is submitted to any form of torture, abuse and humiliation, medical or scientific experiments shall be prohibited and punishable. Unlawful acts are primarily considered procedures that are disproportionate to maintain order and discipline in the organization or organizational unit, or are illegal and may incur suffering or inappropriate

restriction of the fundamental rights of a convicted person. A convicted person who has been the victim of prohibited practices shall be entitled to the compensation of damage.

9. The Law on the enforcement of sentences of imprisonment, fines and security measures expressly stipulates the obligation of an organization and of penitentiaries to keep the records and statistics on persons subject to execution of sanctions and detention. The Law on the enforcement of sentences of imprisonment, fines and security measures, as well as bylaws adopted on the basis of the said Law, provide for the admission of detainees, the establishing of their identity, and the like. Thus, Rulebook on the content, method of keeping and storage registers and personal files of prisoners ("Official Gazette of Montenegro", No. 037/16 of 16.06.2016) provides details on the content, method of keeping the registers and storing personal files of prisoners and prisoners who are serving a sentence of imprisonment or a prison sentence of forty years.

10. Register of prisoners contain: ordinal number, the number of personal files of prisoners, prisoners' name, father's name, or the name of the mother if the father is unknown, day, month, year of birth, place and country where the person was born, a unique registration number and nationality, permanent or temporary residence, level of education and qualifications of interest, information on crime, and tackle indicating the name, article, paragraph and the law, the authority that issued the decision, number and date of the decision, information on the type and amount of penalty and security measure, if imposed, information on whether the prisoner volunteered or was brought to the execution of the sentence, the date and time of receipt of the enforcement of the sentence, the time spent in custody, the details of the expiry of the sentence or security measure, the authority that issued the decision, number and date of the decision by which the penalty is modified (amnesty, pardon, a single sentence), and imposed a new penalty, the legal basis (regular discharge, parole, pardon, amnesty) and date of release of the organizational unit of the Institute which is executed prison sentence and a prison sentence of forty years, the fact that the returnee and how many times, remarks (transfer, termination, etc.).

11. Personal file of prisoners include: number; date of entry in the register of prisoners; classification group and whether the returnee; Special features and photos of prisoners (on admission, after five years, ten years later, after 15 years, after 20 years, after 25 years); information on prisoner (name, nickname, surname, father's name, mother's name or if the father is unknown, as well as the maiden name of mother, day, month and year of birth, place, municipality and country of birth, place of residence or temporary residence, ID card number, passport or other documents from which one can determine the identity, gender, nationality, ethnicity (with the prior written consent of the prisoners), religion (with the prior written consent of the prisoners), property, marital status, data on family members and the number of minor children, the level of educational qualifications, occupation prior to the commission of the offense, data on personal matters); details on Sentencing (type and level of fines, type and duration of security measures, if the sanction to the punishment, information on crime or tackle indicating the name, members, attitudes and laws, information about accomplices brief description of the offense, the authority that has decision, number and date of the decision, the time spent in detention, the fact that you are a prisoner volunteered or was escorted to the execution of the sentence, the date and time of imprisonment, information on the expiry and amending the expiration of the sentence or security measures, data on earlier penalties and enforcement (name of the court, number and date of the judgment, the type and level of fines, crime, date and grounds for release from prison, the prison from which he was dismissed, and the name of the body if he was serving a sentence in another country), name of the body which decided, number and date of the decision by which the penalty is modified (amnesty, pardon, a single sentence), and imposed a new penalty, the legal basis (regular discharge, parole, pardon, amnesty) and date of release from prison); data on persons who are entitled to regular visits to a prisoner (name, kinship, permanent or temporary residence, remarks); Passenger description

prisoners (face shape, hair type and personality, shape of the forehead, the description of the tooth, eye colour, size and shape of the nose, the shape of the ears, chin description - profile, distinguishing marks - scars, warts, birthmarks, freckles, tattoos, type and level disability, fingerprints and palm height, development, changes occurred in the physical identity); data on the run, termination penalties and death of prisoners (natural, suicide, killed at large); information on the complaints, applications, appeals and other submissions (date of surrender prison number from the book established, the date of dispatch of the application, subject, where the submission was sent, the date when the response is received, as resolved); information on submissions that are sent to the Department data on behaviour of inmates while incarcerated. Register of prisoners and the personal file of prisoners are kept in written form, and may be maintained in electronic form.

III. Information relating to paragraph 29 of the concluding observations

Paragraph 29

The State party should consider introducing the legislative amendments necessary to establish a definition of victim that conforms to that contained in article 24 (1) of the Convention in order to ensure the full enjoyment by any individual who has suffered harm as the direct result of an enforced disappearance of the rights set forth in the Convention, in particular the rights to the truth and reparation enshrined in its article 24 (2), 24 (4) and 24 (5).

12. As concerns the meaning of the term victim under Article 24, paragraph 1 of the Convention, the Montenegrin Criminal Procedure Code under Article 22 stipulates that the injured parties are those whose personal or property rights of some type were violated or threatened by a criminal offense. The principle of truth and justice is one of the basic principles of a criminal procedure, where the Court, State Prosecutor and other public bodies participating in criminal proceedings must truthfully and completely establish the facts relevant to render a lawful and fair decision, and who should, with the equal attention investigate and establish the facts incriminating the accused and those in its favour.

13. The Code of Criminal Procedure provides procedural and legal measures to protect witnesses from intimidation, special ways of participation and questioning of protected witnesses, which accordingly apply to the participation and hearing of the injured party in criminal proceedings (Arts.120-124). When it comes to communication of decisions in criminal proceedings (judgments, decisions or orders) unless the Criminal Procedure Code provides otherwise, decisions shall be communicated by oral pronouncement to persons having legal interest, if present, or by submitting a certified copy, where they are absent (Article 191).

14. The right to compensation for unlawful conduct is guaranteed by the Constitution of Montenegro prescribing that person unlawfully or wrongfully detained or wrongfully convicted shall be entitled to compensation of damages from the State (Article 38).

15. When it comes to police work, a person who believes that its freedoms and rights have been violated by the performance of police duties or are prejudiced, shall be entitled to judicial protection and compensation of damages, in accordance with the Law on Internal Affairs (Article 17).

16. The Criminal Procedure Code stipulates that a person who is unlawfully or unjustifiably detained or wrongfully convicted shall be entitled to rehabilitation, the right to compensation of damages from the State, as well as other rights established by law (Article

3 0112 115680479

13). The right to the compensation of damage for unjustifiable conviction shall be vested in a person against whom a criminal sanction was imposed by a final decision or who was pronounced guilty and subsequently, upon an extraordinary legal remedy, the new proceedings was finally discontinued or the convicted person was acquitted by a final judgment or charges were rejected, except if: the proceedings was discontinued or the charge was dismissed by a ruling because in the new proceedings the subsidiary prosecutor or private prosecutor waived the prosecution, provided that the waiver occurred on the basis of an agreement with the accused person; in the new proceedings the charge was dismissed by a ruling because the court lacked jurisdiction and the authorized prosecutor has initiated prosecution before a competent court. A convicted person i.e. an acquitted person, is not entitled to the compensation of damages if it caused the criminal proceedings through a false confession in the investigatory procedure or otherwise, or caused its conviction through such statements during the proceedings, unless it was forced to do so; In the case of conviction for offences committed in concurrence, the right to compensation of damages may also relate to respective criminal offences in regard to which the conditions for approving compensation are met.

17. The law regulates liability for damages based solely on objective circumstances, i.e. not on unjustified conviction or unfounded deprivation of liberty, which is a result of a desire to protect the rights and the properties of a person, its physical integrity and personal liberty. For the detention to be unfounded, proceedings should be discontinued by a final decision, or terminated by a final judgment of acquittal or a ruling rejecting the charge. There is a possible occurrence of pecuniary and non-pecuniary damages, as a result of unjustified deprivation of liberty or unjust conviction. The Court assesses the amount of compensation and pecuniary and non-pecuniary damages, while the legal position is that for the mental pain due to unlawful deprivation of liberty 3,000 to 4,000 euros shall be paid for a month of unlawful detention, depending on the circumstances prescribed by the Law on Obligations.

18. Montenegro ratified the European Convention on the Compensation of Victims of Violent Crimes in 2009.